

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

May 27, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: DAVID EMANUEL HENRY,

Movant.

No. 16-2103
(D.C. Nos. 1:16-CV-00370-JB-LAM &
1:11-CR-02660-JB-1)
(D. N.M.)

ORDER

Before **BRISCOE**, **GORSUCH**, and **BACHARACH**, Circuit Judges.

Movant David Emanuel Henry, a federal prisoner proceeding through counsel, seeks an order authorizing him to file a second or successive 28 U.S.C. § 2255 motion in the district court so he may assert a claim for relief based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). *See* 28 U.S.C. §§ 2255(h), 2244(b)(3). In 2012, Movant was convicted of a firearms offense in violation of 18 U.S.C. § 922(g). He alleges that his sentence for that offense was enhanced under the Armed Career Criminal Act (ACCA) based on his having three qualifying prior convictions, *see* 18 U.S.C. § 924(e)(1), at least one of which was a violent felony. Movant now seeks to file a § 2255 motion challenging his enhanced sentence based on the Supreme Court’s opinion in *Johnson*, which invalidated the residual clause in the ACCA’s definition of “violent felony” as unconstitutionally vague.

To obtain authorization, Movant must make a prima facie showing that his claim meets the gatekeeping requirements of § 2255(h). *See* 28 U.S.C. § 2244(b)(3)(C).

Relevant here is the requirement that the claim rely on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” 28 U.S.C. § 2255(h)(2). Based on the information before us, we conclude that the Movant has made the required showing. *Johnson* announced a new rule of constitutional law, and the Supreme Court made *Johnson* retroactive to cases on collateral review in *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016).

Accordingly, we grant David Emanuel Henry authorization to file a second or successive § 2255 motion in district court to raise a claim based on *Johnson v. United States*.

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal flourish line.

ELISABETH A. SHUMAKER, Clerk